

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DOROTHY E. CLARKSON and

ELIZABETH F. DINSMORE,

Plaintiffs,

V.

C.A. No. 04C-03-109 MMJ

SELMA GOLDSTEIN in her individual capacity, and ON BEHALF OF THE ESTATE OF LOUIS GOLDSTEIN,

Defendants.

SELMA GOLDSTEIN,

Counterclaim Plaintiff,

V.

DOROTHY E. CLARKSON and

ELIZABETH F. DINSMORE,

Counterclaim Defendants.

SELMA GOLDSTEIN,

Third-Party Plaintiff,

V.

ERISMAN & VAN OGTROP,

Third-Party Defendant.

CORRECTED MEMORANDUM OPINION

Upon Defendants' Motion for Summary Judgment

Submitted: December 8, 2006

Decided: February 28, 2007

Corrected: April 17, 2007

Deborah I. Gottschalk, Esquire, Eliza Morgan Hirst, Esquire, Community Legal Aid Society, Wilmington, Delaware, *Attorneys for Plaintiffs*

P. Clarkson Collins, Jr., Esquire, Liza H. Sherman, Esquire, Morris, James LLP, Wilmington, Delaware, *Attorneys for Mary M. Culley, Administratrix for the Estates of Louis and Selma Goldstein*

JOHNSTON, J.

PROCEDURAL CONTEXT

This is an action brought by Plaintiffs Elizabeth F. Dinsmore and Dorothy E. Clarkson alleging claims of fraud, conversion, and violation of the Delaware Prohibited Trade Practices Act (“DPTPA”).¹ Plaintiffs seek return of all money paid to Defendants, the Estate of Selma Goldstein² and the Estate of Louis Goldstein, in excess of the amount Defendants paid, if any, toward the existing mortgage on property located at 1200 West 3rd Street, Wilmington, Delaware (“Property”). Plaintiffs also seek enhanced civil penalties under the DPTPA³ in connection with the sale of the Property.

Plaintiffs filed the first motion for summary judgment. After extensive briefing and oral argument, the Court issued its opinion dated May 31, 2005. The Court ruled:

Plaintiffs’ Motion for Partial Summary Judgment is hereby **GRANTED**. The Court finds that Louis and Selma Goldstein perpetrated common law fraud against Mrs. Dinsmore and Ms. Clarkson, and that the fraudulent conduct was in violation of Delaware’s Prohibited Trade Practices Act, and Delaware’s Deceptive Trade Practices Act. Plaintiffs are entitled to: (1) compensatory damages in the amount of Plaintiffs’ payoff liability in the Bank One

¹6 Del. C. §§ 2511 *et seq.*

²On May 9, 2006, Selma Goldstein was murdered. A suggestion of death was filed on May 15, 2006.

³6 Del. C. §§ 2580(a), 2581(a).

Mortgage foreclosure proceedings, and attorneys' fees incurred as a part of the foreclosure proceedings; (2) enhanced civil penalties pursuant to 6 *Del. C.* § 2581(a) in the amount of \$20,000 (\$10,000 against each Defendant); (3) treble damages pursuant to 6 *Del. C.* § 2533(c) of three times compensatory damages; and (4) reasonable attorneys' fees pursuant to 16 *Del. C.* § 2533(b).

IT IS SO ORDERED.

On May 31, 2005, the Court granted the motion of counsel for Defendants to withdraw from representation. Defendants obtained new counsel on October 12, 2005. Eight and a half months after the first summary judgment opinion was issued, and over four months after Defendants retained new counsel, Defendants filed a pleading styled "Motion and Application for Leave to Pursue a Statute of Limitations Defense and Motion for Relief from Judgment or Order."

By Memorandum Opinion dated June 30, 2006, the Court found that defendants had asserted the affirmative statute of limitations defense in their amended answer and counterclaim. Therefore, the Court ruled that the statute of limitations defense was validly asserted and had not been waived. The Court also noted that it would have been prudent and far preferable for Defendants to have argued the defense in connection with the summary judgment briefing. Although Defendants were not legally obligated to raise the defense at that time, failure to do so resulted in an inefficient use of judicial resources. Finally, the Court held

that Defendants failed to demonstrate the existence of any extraordinary circumstances justifying Rule 60 relief. However, having found that the statute of limitations defense was properly asserted and not waived, the Court did not need to resolve whether to permit Defendants to pursue the defense on the basis of Rule 60.

Defendants⁴ then filed a Motion for Summary Judgment. The issue presented by this motion is whether the statute of limitations that governs actions for fraud and violations of the Delaware Prohibited Trade Practices Act bars the fraud and conversion claims filed by Plaintiffs.

ANALYSIS

Summary Judgment Standard

The parties have agreed that this motion is ripe for disposition under Superior Court Civil Rule 56(h). There is no genuine issue of material fact. Therefore, the Court deems that this motion is the equivalent of a stipulation for decision on the merits, based on the record submitted with the motion and Plaintiffs' opposition to the motion.

⁴At this point in the proceedings, Defendants are the Estates of Louis and Selma Goldstein.

Undisputed Facts

In 1983, Plaintiffs begin renting the Property from Louis and Selma Goldstein. Mr. Goldstein was an attorney who practiced in Wilmington, Delaware. Mr. Goldstein died on March 31, 2004.

The Property was condemned by the City of Wilmington, Department of Licenses and Inspections, in 1990. The “Unfit for Human Habitation Notice,” dated October 29, 1990, lists Louis Goldstein as “Agent” for William and Blanche Raisin.

In 1990, Mr. Goldstein approached Plaintiffs about buying the Property. Plaintiffs agreed to buy the Property. The closing was held at the offices of Robert E. Daley, Esquire.⁵

At closing, it was revealed that there was an existing mortgage in favor of Bank One Columbus, N.A. (“Bank One Mortgage”)⁶

Plaintiffs also signed an undated document, stating in part:

1. That since the first mortgagee of the property, to wit, John Hancock Insurance Company is not aware of the transfer of the property, that the Company may call in the entire existing

⁵Mr. Daley is deceased. He practiced law with the firm formerly known as Erisman & Van Ogtrop.

⁶The mortgage originally was held by Mercantile Mortgage Corporation, predecessor in interest to Bank One.

balance on the mortgage at such time as they receive notification of the transfer.

This document refers to “legal instruments” executed on December 31, *1991*.

There are no relevant documents signed December 31, *1991*.

A second “Statement” signed by Plaintiffs on December 30, 1990 states:

The undersigned do hereby acknowledge that on this date our attorney, Robert E. Daley, has fully explained to us the consequences of signing the Bond and Warrant executed this day by us in favor of Selma Goldstein concerning our purchase of property No. 1200 West 3rd St., Wilmington, Delaware and, specifically, has explained the “Confession of Judgment” clause in the said Bond and Warrant and the procedures available to us, our heirs and assigns, under the provisions of Superior Court Rule 58.

As a result of his explanation to us, we now understand that by signing the Bond with the Warrant of Attorney we are waiving our right to notice and to a hearing prior to an entry of judgment before default has occurred. We make this waiver knowingly, intelligently, and voluntarily, and with the advice of our attorney of the consequences of signing.

Both documents were witnessed by Robert E. Daley, Esquire.

By affidavit, Ms. Clarkson testified:

5. Louis Goldstein arranged for a settlement closing at the office of attorney Robert Daley, where Goldstein, Daley, Mrs. Dinsmore and I were the only ones in attendance. Since Mr. Goldstein arranged the entire sale and transfer, I believed Mr. Daley was Mr. Goldstein’s attorney. I did not realize at the time he was the attorney for Mrs. Dinsmore and me.

6. At the closing, Mrs. Dinsmore and I signed documents waiving Mr. Goldstein and Mr. Daley's liability but we never received an explanation of these documents or the consequences of signing them.
7. At the closing, we also signed a mortgage agreement with Selma Goldstein. When Mr. Daley asked about the other mortgage on the property, Mr. Goldstein told Mr. Daley, Mrs. Dinsmore and I not to worry about it because it had nothing to do with us.

Mrs. Dinsmore testified by affidavit:

6. Louis Goldstein arranged the sale of the property and secured attorney Robert Daley to perform the closing.
7. At the closing, the only people present were Mr. Daley, Mr. Goldstein, Ms. Clarkson and me.
8. Throughout the closing, I believed that Mr. Daley was Louis Goldstein's attorney.
9. Although I signed documents regarding a mortgage to Selma Goldstein, I never met with Selma to discuss the terms of the mortgage.
10. When asked about the other mortgage at closing, Mr. Goldstein said "it has nothing to do with you, don't worry about it."
11. Later, Ms. Clarkson asked Mr. Goldstein about the mortgage, and Mr. Goldstein wrote Ms. Clarkson in 2000 that the Mercantile mortgage had nothing to do with us.
12. In addition to the mortgage agreement, I also signed a deed transferring the property from Louis and Blanche Rasin to me and Ms. Clarkson as of 1981. While I did not know who the Rasins were, and although we did not move into the rental

property until 1983 nor buy the property until 1990, I assumed there would not be problems with the transfer since Mr. Daley and Mr. Goldstein encouraged us to sign the documents. I assumed that because both Mr. Daley and Mr. Goldstein were attorneys that the documents were legal and without problems.

The deed was not recorded until January 22, 1991. The deed conveying the Property to Mrs. Dinsmore and Ms. Clarkson was signed by William L. and Blanche Raisin, as sellers, on July 30, 1981, nine and a half years before closing. Mr. and Mrs. Goldstein's names are not listed anywhere on the deed. The Affidavit of Residence signed by Mr. and Mrs. Raisin on July 31, 1981 as sellers does not list Mr. and Mrs. Goldstein as purchasers. The line titled "Name and Address of Purchaser" is blank.

Plaintiffs made monthly mortgage payments to Selma Goldstein in amounts of \$375.00 or slightly more until 1997. Payments in amounts substantially lower or slightly higher than \$375.00 were received by Defendants in 1998, 1999 and 2000. By letter dated June 13, 2000, Mrs. Dinsmore stated that she "should have sent payments" to Bank One. "Mr." Goldstein stated in a letter to Elizabeth Dinsmore dated June 20, 2000:

Mrs. Dinsmore –

You are confused about your mortgage! If you look at your original settlement papers you will notice that I already had a mortgage of my own on your property. *You have nothing* to do with that mortgage

company. What you payment helps me pay off my mortgage to that company. *Your mortgage* is paid to me - not any company. If you have any questions, call me. Louis Goldstein⁷

Plaintiffs did not make several monthly mortgage payments between 1998 and 2000. Three payments of \$60.00 were received in 2001 and two payments of \$100.00 were received in 2002. Eventually, Plaintiffs failed to make a number of payments to Mrs. Goldstein. Mr. Goldstein sent Plaintiffs a delinquency notice dated April 11, 2001.

On or about June 27, 2003, Bank One filed a mortgage foreclosure action against William and Blanch Raisin, Mrs. Dinsmore and Ms. Clarkson (“Foreclosure Proceeding”).

Applicable Statute of Limitations

The mortgage entered into among Selma Goldstein and Plaintiffs was signed under seal. The testimonial clause states: “IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals, the day and year aforesaid.” The mortgage provides that it is “Sealed and Delivered in the Presence of” and contains the word “(seal)” after each of Plaintiffs’ signatures. The mortgage was executed on December 31, 1990.

⁷During the January 7, 2005 hearing, Defendants’ counsel stated that although the note is on stationery labeled “From the Desk of Louis Goldstein Attorney,” and purportedly signed by Louis Goldstein, the handwriting is that of Selma Goldstein.

It is well-settled in Delaware that the statute of limitations for contracts under seal is twenty years.⁸ Having been filed on March 8, 2004, this action clearly is within the 20-year statute of limitations.

Defendants argue that the 3-year statute of limitations applies because this is not an action on a mortgage. The Court disagrees. The mortgage foreclosure action against William and Blanche Raisin, Mrs. Dinsmore and Ms. Clarkson was filed on June 27, 2003. Fraud may not be asserted as a defense in a *scire facias sur mortgage* foreclosure action.⁹ Defenses that may be asserted in a *scire facias sur mortgage* action are limited to satisfaction, payment, discharge, release, or the absence of a valid lien from the inception.¹⁰ Plaintiffs were required to bring their fraud-in-the-inducement claim in a separate action. The inability to raise a fraud-in-the-inducement defense, in a narrowly-proscribed mortgage foreclosure action, does not mean that all claims regarding instruments under seal are limited to a 3-year statute of limitations. The 20-year common law statute of limitations controls

⁸10 *Del. C.* § 8106 (“no action to recover a debt ***not evidenced***...by an instrument under seal...shall be brought after the expiration of 3 years....”) (Emphasis added); *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983); *State ex rel. Secretary of DOT v. Regency Group, Inc.*, 598 A.2d, 1123, 1129 (Del. Super. 1991) (Actions upon instruments under seal are subject to the 20-year common law limitations period.).

⁹*Quillen v. Sayers*, 482 A.2d 744, 748 (Del. 1984).

¹⁰*C.J.S. Mortgages* § 700 (2006).

the instant action. However, Plaintiffs' recovery is limited to setoff against the amount of the mortgage.

Plaintiffs' claims for common law fraud, conversion, and violations of the DPTPA are subject to the 3-year statute of limitations.¹¹

Time of Discovery and Fraudulent Concealment

Fraudulent concealment tolls the statute of limitations until such time as the fraud and concealment are discovered, or could have been discovered by exercise of reasonable diligence. The defendant must have had actual knowledge of the wrong done and must have acted affirmatively in concealing the facts from the plaintiff. Mere ignorance, in the absence of actual artifice, is no obstacle to operation of the statute.¹²

Defendants list 6 events that they allege should have placed Plaintiffs on notice that Defendants did not hold record title to the Property. Defendants argue that "the cumulative effect of all of these 'hints' was a realization by Plaintiffs that something was amiss." Under the specific facts and circumstances presented in

¹¹10 Del. C. § 8106.

¹²*Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966); *Bradford, Inc. v. Travelers Indem. Co.*, 301 A.2d 519, 525 (Del. Super. 1972); *Nardo v. Guido DeAscanis & Sons*, 254 A.2d 254, 256 (Del. Super. 1969).

this case, the Court finds that these “hints” were not sufficient to place Plaintiffs on notice that fraud and concealment had occurred.

The first salient factor is the clear disparity in the sophistication of the parties. As the Court found in the May 31, 2005 Memorandum Opinion, Louis Goldstein was a member of the Delaware Bar, practicing in the area of real property. There is no doubt that Mr. Goldstein was acutely aware of the requirements concerning recording deeds.¹³ This is not a situation in which the Goldsteins were naive consumers, relying on the closing attorney to perform all of the necessary settlement functions. The only reasonable conclusion to be reached from review of the undisputed material facts is that the Goldsteins intended to convey the Property from the Raisins to Plaintiffs, without ever becoming record owners and in avoidance of payment of transfer taxes and other legal obligations.

It is obvious that Selma Goldstein was not a bystander to the transaction. She is the sole named mortgagee of record. She is the actual author of the letter to Mrs. Dinsmore, admonishing Mrs. Dinsmore: “You are confused about your mortgage! ... You have nothing to do with that [Bank One] mortgage company.”

It is noteworthy that the Goldsteins were careful to record the Goldstein Mortgage in a timely manner to ensure the enforceability of any debt owed to

¹³25 Del. C. §§ 101, *et seq.*

them. In contrast, they neglected to record any deed which would trigger their legal burdens of ownership. This dichotomy is demonstrated by a document signed by Mrs. Dinsmore and Ms. Clarkson dated December 31, 1991. The document is a form of acknowledgment that Plaintiffs were advised by Robert E. Daley, Esquire, the closing attorney, that the mortgage company was “not aware of the transfer of the property” and that Plaintiffs were “relying solely upon Louis Goldstein, Esquire to make the monthly mortgage payment on the ... mortgage.”

Mr. Goldstein was engaged in over 200 real estate transactions from 1950 to 2000. Mrs. Goldstein was involved in over 100 real estate transactions during the similar time period, in her name alone. These transactions included buying and selling property, and granting, obtaining and assessing mortgages. In addition, Louis and Selma Goldstein formed several corporations that dealt strictly with real estate.

At the time the Property was sold to Plaintiffs, Louis and Selma Goldstein clearly represented themselves to Mrs. Dinsmore and Ms. Clarkson as owners of the Property. If the Goldsteins were not in fact owners of the Property, their representation cannot be construed as anything other than “deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of [a] material fact.”

It is equally clear that Plaintiffs relied on the Goldsteins' ownership of the Property in entering into the Goldstein Mortgage. It cannot be disputed that the Goldsteins intended for Plaintiffs to rely upon the Goldsteins' ownership of the Property as an inducement for Plaintiffs to purchase the Property and to make payments pursuant to the Goldstein Mortgage secured by the Property.

The question before the Court is whether Plaintiffs, as laypersons, should have had the ability and knowledge to have discovered Defendants' fraud before the foreclosure action was filed on March 8, 2004. The Court finds that Plaintiffs were blamelessly ignorant of Defendants' fraud, deceit and concealment prior to March 8, 2004.¹⁴

Plaintiffs are elderly, of modest means, and not experienced in business in any way. They relied on not one, but two experienced attorneys, who directed them what, when and where to sign. By its nature, the Goldsteins' scheme to obtain all of the benefits of holding property, without assuming any of the potential liabilities (including payment of taxes), was complex and intentionally misleading. The deceit was accomplished through a course of dealing with Plaintiffs over a substantial period of time.

¹⁴See *Wright v. Dumizo*, 2002 WL 31357891, at * 3-4 (Del. Super.) (factual question whether lay persons should have knowledge of professional malfeasance).

When Mrs. Dinsmore questioned whether Mrs. Goldstein was the proper party to whom mortgage payments should be made, Mrs. Goldstein (apparently even concealing her identity by signing Mr. Goldstein's name) intentionally reinforced the illusion that all was well and that Plaintiffs should not have any cause for worry. Mrs. Goldstein's actions and language¹⁵ had the intended effect of insulting and intimidating Plaintiffs and leaving them with a false sense of security. The undisputed facts demonstrate that Defendants affirmatively concealed their pattern of fraud and uninterrupted artifice.

CONCLUSION

The 3-year statute of limitations applies to Plaintiffs' cause of action for fraud, conversion and violations of the Delaware Prohibited Trade Practices Act.¹⁶ The statute of limitations is tolled until such time as Defendants' fraud and concealment were discovered, or could have been discovered by exercise of reasonable diligence. The first date upon which Plaintiffs should have been aware of their cause of action was at the time of filing of the foreclosure proceedings on June 27, 2003. Plaintiffs first asserted their claims in the Third-Party Complaint,

¹⁵The note began: "You are confused about your mortgage!"

¹⁶The 20-year statute of limitations applies to the extent of setoff from amounts due under the mortgage, which is an instrument under seal.

which was filed on September 26, 2003, in response to the foreclosure action.¹⁷ In response to a Motion to Dismiss, the foreclosure action was stayed and Plaintiffs were directed by the Court to file this suit. Plaintiffs filed this action on March 8, 2004.

THEREFORE, this action is timely filed. The Motion for Summary Judgment, on the issue of the statute of limitations, of Defendants, the Estates of Louis and Selma Goldstein, is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

cc: Prothonotary

¹⁷*Bank One v. William Lewis Raisin, Blanch Raisin, Elizabeth F. Dinsmore and Dorothy E. Clarkson*, C.A. No. 03L-06-90 HLA.